

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 10, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP165-CR

Cir. Ct. No. 2012CF2106

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

STEVEN L. SOMMER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Steven L. Sommer appeals a judgment convicting him of three counts of child abuse, recklessly causing great bodily harm. He also appeals an order granting in part and denying in part his motion for postconviction relief. Sommer argues: (1) that a post-sentencing psychological evaluation is a

“new factor” that should allow him to be resentenced; (2) that the circuit court relied on inaccurate information in sentencing him; and (3) that he received constitutionally ineffective assistance from his trial lawyer. We affirm.

¶2 Sommer was charged with the crimes for severely harming his two-month-old triplet daughters by twisting their legs and breaking their bones in multiple places on several different occasions. When the children’s mother noticed swelling and bruising on one of the children’s legs, she went to the hospital. Medical imaging showed that the child and her sisters had multiple broken bones and that the injuries had been inflicted at different times. Sommer confessed to the police and pled guilty to the crimes. The circuit court sentenced him to five years of imprisonment on each count, with two years and six months of initial incarceration and two years and six months of extended supervision, to be served consecutively.

¶3 Sommer first argues that he is entitled to resentencing based on a psychological evaluation after sentencing by Dr. David W. Thompson, Clinical and Forensic Psychologist. Sentence modification motions require a two-step process: (1) the defendant must demonstrate by clear and convincing evidence that a new factor exists; and (2) if a new factor exists, the circuit court must exercise its discretion to determine whether the new factor justifies sentence modification. *State v. Harbor*, 2011 WI 28, ¶¶36-37, 333 Wis. 2d 53, 797 N.W.2d 828. A new factor is ““a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties.”” *Id.*, ¶40 (citation omitted). Whether a new factor exists is a question of law that we review *de novo*. *Id.*, ¶36.

¶4 Sommer argues that the post-sentencing psychological evaluation is a new factor because it shows that his intelligence is below average, that he has considerable language difficulties and that he does not pose a high risk to the public. Sommer contends that his intellectual and language limitations, and his low risk of committing violent offenses in the future, are new factors because at the time of the original sentencing, this information about him had not yet been discovered.

¶5 Sommer's intellectual and linguistic limitations are not new factors because they were not highly relevant to the sentence the circuit court imposed. In deciding the sentence to impose, the circuit court focused on the vulnerability of the victims and Sommer's horrific conduct:

The way you handled them was—before you even broke the bones you broke, is appalling. And it's incomprehensible that someone would treat their children that way. And the way in which you systematically broke their legs by twisting them as you changed each of their diapers. Systematically. One after the other in order of age. It shocks the conscience, Mr. Sommer. It is unbelievable. And the fact that it happened more than once shocks the conscience. We can't say that this was a one time thing where a kid talked back or acted out and a parent hit too hard or [acted] in anger. It's not even anything like that. Because they're infants, they're helpless. And one after the other on more than one occasion you tortured them. I mean, you twisted their legs [until] they broke.

....

[Y]ou had no regard, no regard for them as human beings, no regard for them as the helpless creatures that they were, no regard for them as your own flesh and blood, as your ability as a caretaker, as someone who you were entrusted with the lives, their lives, and no regard for their future and what would happen to them. And then even having done this once, for some reason, to not call for help, to let the pain and suffering of a child go on until they—the mother saw the swelling, and it had been a month of injuries, to not even even come forward and get help for these children, it

shows a scariness on your part that I believe is something that we have to be afraid of as a community. It shows that you aren't, you don't have the empathy that one would expect a person to have, that you don't have that empathy. And people without empathy, people without a sense of conscience, it's frightening, Mr. Sommer. Those are people that can hurt other people without any regard, as you did here.

The circuit court's comments show that it based its sentence on Sommer's conduct during the crimes, not on his demeanor in court or any apparent lack of remorse in court. As for Dr. Thompson's conclusion that Sommer presents a low risk of future violence, that information is not new. The presentence investigation report stated that Sommer's overall risk potential was low based on a COMPAS assessment. Sommer has not shown the existence of a new factor entitling him to sentence modification.

¶6 Sommer next argues that the circuit court relied on inaccurate information in sentencing him because the circuit court said that he violated the court's no contact order. A defendant has a due process right to be sentenced based on accurate information. *State v. Travis*, 2013 WI 38, ¶17, 347 Wis. 2d 142, 832 N.W.2d 491. To be entitled to resentencing, a defendant "must establish by clear and convincing evidence that the circuit court actually relied on the inaccurate information." *Id.*, ¶22. "Whether the circuit court 'actually relied' on the incorrect information at sentencing ... turns on whether the circuit court gave 'explicit attention' or 'specific consideration' to the inaccurate information, so that the inaccurate information 'formed part of the basis for the sentence.'" *Id.*, ¶28 (quoting *State v. Tiepelman*, 2006 WI 66, ¶14, 291 Wis. 2d 179, 717 N.W.2d 1).

¶7 The circuit court modified a no contact order prohibiting Sommer from communicating with the children or their mother to allow Sommer to attend the funeral of one of the three girls, who died of causes unrelated to Sommer's

abuse. Sommer's attorney requested the modification so that Sommer could attend the funeral and communicate with Maria, the children's mother.

[DEFENSE]: I received a call from Mr. Sommer indicating that one of the triplets had passed. I believe it was SIDS. We were asking that the no contact order be modified. He wants to attend the funeral. He wants to go to the hospital. He wants to do whatever he needs to do to see his child.

He was—he also wanted to have some contact with the mother which is Maria. I had stayed in contact with her to see if it was okay for the purposes of dealing with the funeral and the situation and seeing her at the funeral.

THE COURT: State's position?

[ADA]: Mr. Sommer already entered pleas on the matter. So the state's concern is somewhat alleviated in that regard. This is a tragic circumstance, and I think he should have the ability to go to the funeral and to bereave with the mother. So I am not objecting to the modification solely for those purposes.

THE COURT: I will modify. It is limited though to the ability to attend the funeral and the subsequent—if there's any type of viewing or any type of family gathering surrounding the funeral that that modification can be made, it's limited solely to that.

So once that time has passed, the no contact order is going to return. I don't know if we have a time period that it's better to frame it under. Do you know when the funeral is?

[DEFENSE]: No.

THE COURT: Well, I'll leave it that. It's modified. The no contact order is—I'll essentially lift the no contact order for purposes of Mr. Sommer attending to the funeral and any subsequent gatherings surrounding the funeral only.

And once that time has passed once the funeral is over and any gatherings relating to the funeral are over that no contact order is going to return to effect. Hopefully that's clear enough. I think it should be. Just for purposes of being able to grieve and attend the funeral.

¶8 In its order denying the postconviction motion, the circuit court stated that it did not intend to allow Sommer to communicate with the mother. It only intended to allow him to attend the funeral and other family events related to the funeral. From the exchange recounted above, however, the scope of the no contact order modification is somewhat ambiguous. Regardless, Sommer is not entitled to relief because the circuit court did not rely on the information in framing its sentence. To the contrary, the circuit court did not mention the no contact order or a purported violation of it at all in its sentencing remarks. A defendant seeking resentencing on due process grounds must show both that the information was inaccurate and that the circuit court relied on the inaccurate information. *Travis*, 347 Wis. 2d 142, ¶22. Sommer cannot make the second showing. Therefore, Sommer is not entitled to relief on the grounds that he was sentenced on the basis of inaccurate information.

¶9 Finally, Sommer argues that he received constitutionally ineffective assistance from his trial lawyer. To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. *Id.* at 697. If this court concludes that the defendant has failed to prove one prong, we need not address the other prong. *Id.* Counsel is not ineffective for failing to raise meritless arguments. *State v. Toliver*, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994).

¶10 Sommer contends that his lawyer should have corrected the circuit court when the court suggested that he talked to the children's mother Maria in violation of the no contact order. As we just explained, the circuit court did not

mention the fact that Sommer talked to Maria at the funeral when it explained at length the reasons for its sentence. Because the circuit court did not consider the fact that Sommer and Maria had contact during the funeral in the context of framing its sentence, it would have made no practical difference if Sommer's lawyer had argued to the circuit court that Sommer was not in violation of the no contact order when the circuit court told Sommer's father during his sentencing testimony that it did not want to hear about Sommer's conversations with Maria at the funeral because he was not supposed to talk to her. Moreover, the circuit court's postconviction order clearly states that the circuit court believed that its modification of the no contact order did not allow Sommer to talk to Maria, although, as we have noted, the exchange on the record shows the circuit court's comments were somewhat ambiguous. Sommer cannot succeed on an ineffective assistance of counsel claim premised on the fact that his lawyer did not raise an argument that would not have changed the result in this case.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

